ComEd
An Exelon Company

<u>Comments of Commonwealth Edison Company on Certain</u>
<u>Legal Aspects of Implementing The Governor's Sustainable Energy Plan</u>
April 25, 2005

Pursuant to the Illinois Commerce Commission's ("Commission's" or "ICC's") "sustainable energy plan initiative timeline**",** Commonwealth Edison Company ("ComEd") submits these comments "on issues of Commission authority to implement the [Governor's] Sustainable Energy Plan, cost recovery issues and issues of prudence review."

I. General

At the outset, it must be emphasized that participation in the Plan will be voluntary. That being the case, the Commission should do what it can to promote voluntary participation by allowing utilities to recover their costs in a full and timely manner and by encouraging widespread industry participation and associated competitive neutrality. ComEd believes that this can be accomplished in a manner that is entirely consistent with the Commission's existing authority.

Competitive neutrality is an essential element of any statewide plan dealing with renewable energy resources and energy efficiency. That was an item of consensus emanating from the Commission's Post 2006 workshops of last summer. (See *The Post 2006 Initiative: Final Staff Report to the Commission* dated December 2, 2004, at p. 29.) If the costs of implementing the Plan are not fairly borne across all types of suppliers, then there will be a natural reluctance for any supplier voluntarily to subject its customers to the burden of any of the extra costs involved.

In addition, to encourage public utility involvement, the Commission must recognize that, as the Governor has recommended, utilities must be able to recover their costs. Before the utilities can proceed, the Commission will need, upon a proper showing, to make findings that the utilities' implementation of the Plan is an appropriate "utility function" linked to the adequate, efficient, and reliable provision of utility service and that all of the utilities' costs associated therewith are prudently incurred and reasonable and, therefore, fully recoverable in their rates. As the Court of Appeals noted in *Commonwealth Edison Company v. Illinois Commerce Commission* (1989), 181 Ill.App.3d 1002, 538 N.E.2d 213:

> The purpose and duty of the Commission is to ensure that efficient and adequate utility service is provided to the general public at a reasonable cost. [Citations omitted.] The Commission's powers are derived solely from the Act, and its authority is limited by the grants of the Act. [Citations omitted.]

Therefore, in its findings and other actions, the Commission should emphasize that the actions to be taken promote adequate, efficient and reliable utility service.

The Commission, in this regard, will also be required to approve riders or other rate mechanisms to accomplish the recovery of these costs. ComEd proposes that, given the totality of the relevant circumstances, a rider appears to be the more appropriate means of recovery. One reason is that the costs of implementing the Plan will vary from year to year, with actual costs being difficult – at least for the first few years – to predict. Thus, predicting costs for incorporating into the rates as a fixed number is difficult. Also, to the extent cost recovery is at risk, utilities will likely not enter into contracts with suppliers unless they include "regulatory out" provisions. "Firm" contracts – i.e., those without a "regulatory out" provision – would put utilities at risk of incurring unrecoverable costs. A rider mechanism, which included appropriate pre-approval provisions, would mitigate this risk by signaling the Commission's intention to permit utility recovery of contract costs and reducing the likelihood that the "regulatory out" provision would need to be invoked. The greater the regulatory certainty that can be provided regarding cost recovery, the more likely suppliers will be to participate. Regulatory certainty will also likely help reduce the overall costs of the activities taken to implement the Plan.

II. Renewable Portfolio Standard

With respect to the renewable portfolio standard ("RPS") portion of the Plan, the Commission will need to make findings about the utilities' purchase of energy from "renewable" resources or of renewable energy certificates. Specifically, the Commission will need to make findings based on record evidence – prior to the time that the investment is made – that this procurement of renewable supply resources is prudent and that the underlying costs are reasonable in amount. In this case, it would seem that, assuming appropriate showings were made, the Commission could reasonably find that this activity is proper for the utility in order to diversify its supply for supply reliability purposes and to hedge its supply costs with renewable/low-fuel-cost assets on a long-term basis.

Other parties have suggested that such activity may also be reasonably undertaken as, effectively, part of the delivery function. ComEd does not intend to rule this out as a possibility. However, because of the aforementioned link between the RPS portion of the Plan and the utilities' "supply" (as opposed to their "delivery") function, the ability of the Commission to approve utility cost recovery via a "non-bypassable" charge to all customers – including delivery service customers who have chosen alternative suppliers – would be closely scrutinized. Unless a proper showing is made to support this proposition, the problem of competitive neutrality may have to be addressed in a different way. In this case, to put it simply, the RESs would have to participate. If they do not, and this issue is not otherwise addressed, utility customers may be unfairly and disproportionately burdened, the market may be distorted, and, ultimately, utilities may not recover their costs. Thus, to make sure that implementation of the Plan is as competitively neutral as possible, the Commission should strongly encourage participation by RESs.

III. Demand Response and Energy Efficiency

The Commission will need to make findings about the programs responsive to the Plan's demand response ("DR") and energy efficiency ("EE") features, as well. Specifically, the Commission will need to find, based on record evidence and again prior to the time that significant investments are made, that the use of these programs is a prudent means of advancing the adequate, efficient, and reliable provision of utility service. In this case, it would seem that a legitimate case can be made that the use of these programs is a proper way for the utility to enhance its delivery function reliability and/or efficiency by shaving load peaks and managing local demand.

The Commission will also need to find that all the costs associated with DR and EE programs are prudently incurred and reasonable in amount and, therefore, are fully recoverable in the utility's rates charged to delivery service and bundled rate customers. This latter finding would also assist in achieving competitive neutrality by limiting the "bypassability" of the charge. The Commission should establish parameters for making these findings that provide regulatory certainty as to the costs to be recovered. Recovery of these costs in a timely manner may also require approval of a rider mechanism analogous to that required for RPS costs.

It should be noted that an automatic payment of funds to the Department of Commerce and Economic Opportunity ("DCEO"), without an examination of the specific costs and benefits thereof relative to standard utility functions (like, e.g., enhancing delivery function reliability) and without, for example, DCEO's being successful in a "competitive" procurement process for DR or EE programs, would require special justification for its inclusion as a cost that can properly be recoverable in a utility's rates.